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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

CHRISTY BRZONKALA, PETITIONER

v.

ANTONIO J. MORRISON, ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly held that Congress exceeded its constitutional authority under the Commerce Clause when it provided a civil remedy, complete with attorneys fees, for non-commercial violent conduct that involved neither a regulation of commerce nor activity whose regulation was necessary and proper to give effect to a regulation of commerce, but was instead conduct traditionally falling within the police powers reserved to the States?
2. Whether the Fourth Circuit correctly held that Congress exceeded its constitutional authority under Section 5 of the 14th Amendment when it provided a civil remedy, complete with attorneys fees, for violent conduct motivated by gender animus, when the states already protected against such conduct through criminal and tort law?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. IN ENACTING THE VAWA, CONGRESS HAS REJECTED THE PRINCIPLE OF ENUMERATED POWERS, A PRINCIPLE WHICH THE FOUNDERS BELIEVED TO BE ESSENTIAL TO LIBERTY 5

II. THE VAWA IS NEITHER A REGULATION OF COMMERCE NOR A NECESSARY AND PROPER MEANS OF GIVING EFFECT TO A REGULATION OF COMMERCE. 11

A. As Originally Conceived, Congress's Power Under the Commerce Clause Was Limited To The Regulation of Interstate Trade 11

B. Even Under The Expanded View of the Commerce Clause Taken In This Court's Modern-Era Precedents, The VAWA Exceeds The Outer Limits of the Power Afforded to Congress 15

III. THE VAWA CANNOT BE SUSTAINED AS AN EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE 14th AMENDMENT 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

A.L.A. Schecter Poultry Corp. v. *United States*, 295 U.S. 495 (1935) 13, 15, 16

Alden v. *Maine*, 119 S.Ct. 2240 (1999) 3, 17

American Federation of State, County, and Mun. Employees, AFL-CIO v. *State of Washington*, 770 F.2d 1401 (CA9 1985) 18

Atascadero State Hospital v. *Scanlin*, 473 U.S. 234 (1985) .. 8

Bartkus v. *People of State of Illinois*, 359 U.S. 121 (1959) ... 5

Bowman v. *Railway Co.*, 125 U.S. 465 (1888) 13

Brown v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827) 13

Carter v. *Carter Coal Co.*, 298 U.S. 238 (1936) 10, 13

City of Boerne v. *Flores*, 521 U.S. 507 (1997). 18

College Sav. Bank v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219 (1999) 3, 17

Corfield v. *Coryell*, 6 F.Cas. 546 (C.C.E.D.Pa. 1823) ... 11, 12

FERC v. *Mississippi*, 456 U.S. 742 (1982) 9

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S.Ct. 2199 (1999) 3, 17

Garcia v. *San Antonia Metropolitan Transportation Authority*, 469 U.S. 528 (1985) 6, 8, 9, 13

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) ..... passim

Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 3, 8, 9

In re Rahrer, 140 U.S. 545 (1891) 13

Jones & Laughlin Steel, 301 U.S. 1 (1937) 16

Kidd v. *Pearson*, 128 U.S. 1 (1888) 12

Leisy v. *Hardin*, 135 U.S. 100 (1890) 13

M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 8, 10, 15

Mobile Co. v. *Kimball*, 102 U.S. 691 (1880) 13

New York v. *United States*, 505 U.S. 144 (1992) 2, 4, 5

Printz v. *United States*, 521 U.S. 898 (1997) 2, 16

Seminole Tribe of Florida v. *Florida*, 517 U.S. 44 (1996) 3, 4, 17

The Civil Rights Cases, 109 U.S. 3 (1883) 17

The License Cases, 46 U.S. (5 How.) 504 (1847) 12, 13

United States v. *E. C. Knight Co.*, 156 U.S. 1 (1895) 10, 12, 13

United States v. *Lopez*, 514 U.S. 549 (1995) ..... passim

Washington v. *Davis*, 426 U.S. 229 (1976) 18

CONSTITUTIONS AND STATUTES

Declaration of Independence 6

U.S. CONST. ART. I, Sec. 1 8

U.S. CONST. ART. I, Sec. 8 8

U.S. CONST. Amend. X 2, 8

Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55 4

42 U.S.C. § 13981 ..... passim

OTHER AUTHORITIES

Tench Coxe to the Virginia Commissioners at Annappolis (Sept. 13, 1786), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 473-74 (P. Kurland & R. Lerner eds., 1987) 5

Gordon S. Jones & John A. Marini, eds., *The Imperial Congress: Crisis in the Separation of Powers* (1988) 2

James Wilson, Pennsylvania Ratifying Convention (Dec. 4, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 62 ... 7

James Wilson, Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 2 James Wilson, The Works of James Wilson 770 (Robert Green McCloskey ed., 1967) 6

THE FEDERALIST NO. 22 (Hamilton) (C. Rossiter & C. Kesler eds., 1999) 5

THE FEDERALIST NO. 28 (Hamilton) 9

THE FEDERALIST NO. 33 (Hamilton) 9

THE FEDERALIST NO. 39 (Madison) 7

THE FEDERALIST NO. 42 (Madison) 5

THE FEDERALIST NO. 45 (Madison) 7, 10

THE FEDERALIST NO. 47 (Madison) 6

THE FEDERALIST NO. 51 (Madison) 6, 9

S. Rep. No. 197, 102d Cong., 1st Sess. (1991) 18

S. Rep. No. 138, 103rd Cong., 1st Sess. (1993) 11

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INTEREST OF AMICUS CURIAE[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principles, at issue in this case, that We the People delegated to the national

[1]The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. In accord with Rule 37.6, no counsel for a party has authored this brief in whole or in part, nor has anyone but *amicus curiae* and its members made a monetary contribution to the preparation and submission of this brief.

government only certain, specifically enumerated powers and that the bulk of sovereign power, including the police power at issue here, was reserved to the States or to the people.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as amicus curiae in cases of constitutional significance. Of particular relevance here, the Institute has published extensively about the constitutional limitations on the powers delegated to the national government, including a book edited by Gordon Jones and Institute Senior Fellow John Marini entitled *The Imperial Congress: Crisis in the Separation of Powers*.

Recently, in order to further advance its mission, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of amicus curiae briefs in cases such as this that involve issues of constitutional significance going to the heart of the founding principles of this nation.

SUMMARY OF ARGUMENT

Over the past decade, this Court has reinvigorated the Founders' vision of a constitutional system based on a division of the people's sovereign powers between the national and state governments. In *New York* v. *United States*, 505 U.S. 144, 156-57 (1992), for example, the Court recognized that the principle of reserved powers underlying the Tenth Amendment serves as a barrier to the exercise of power by Congress. In *Printz* v. *United States*, 521 U.S. 898, 923-24 (1997), the Court recognized that the principle was grounded not so much in the text of the Tenth Amendment but in the word "proper" of the Necessary and Proper clause, as informed by the overall structure of the Constitution and the numerous clauses that recognize the retention of

sovereign powers by the States. This same idea of state sovereignty has been given voice in the parallel cases arising under the Eleventh Amendment: *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 119 S.Ct. 2240 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199 (1999).

Yet for the Founders, the division of sovereign powers was not designed simply or even primarily to insulate the states from federal power. It was designed so that the states might serve as an independent check on the federal government, preventing it from expanding its powers against ordinary citizens. *United States* v. *Lopez*, 514 U.S. 549, 552, 582 (1995). And it was designed so that decisions affecting the day-to-day activities of ordinary citizens would continue to be made at a level of government close enough to the people so as to be truly subject to the people's control. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). The Tenth and Eleventh amendments are simply examples of what the Founders accomplished principally through the main body of the Constitution itself. Congress was delegated only specifically enumerated powers (and the necessary means of giving effect to those powers) over subjects of truly national concern; it was not given a general police power to control the ordinary, local activities of the citizenry.

In enacting the Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001-40703, 108 Stat. 1796, 1902-55, Congress purportedly acted pursuant to its Article I, Section 8 power "to regulate commerce . . . among the States" and/or its power under Section 5 of the 14th Amendment to insure that no State denied its citizens the equal protection of the laws. Neither of these powers is broad enough to support the enactment by Congress of the provision at issue here, which creates a private right of action against any person "who commits a crime of violence

motivated by gender." 42 U.S.C. § 13981 ("VAWA"). The VAWA is not a regulation of commerce, and it is not a law that gives effect to some regulation of commerce (much less a "necessary" and "proper" one). To construe the commerce clause as broadly as did Congress when it enacted the VAWA and as does the Executive branch in its arguments before this Court, is to render meaningless the primary check on federal power envisioned by the founders—the doctrine of limited, enumerated powers. Moreover, by essentially rendering superfluous the tort law of all 50 states (and, if the principle be taken to its next logical step, the criminal law as well), Congress has here intruded upon the powers reserved to the States in a way that makes the intrusions at issue in *New York* v. *United States* and *Seminole Tribe* look like child's play.

Nor does the 14th Amendment afford to Congress the powers it has claimed here. By this statute, Congress has authorized a civil suit against private citizens, not against the state governments whose supposed denials of equal protection are the putative basis for the exercise of power here. Even if such a remedy might be permissible in some circumstances, it cannot be permissible when there is no underlying violation by the State. Petitioners' argument that there is such a violation amounts to what is essentially a "comparable worth of crimes" analysis, an analysis that has been rejected by the courts in analogous contexts and that finds no support in this Court's 14th Amendment jurisprudence.

In sum, neither the Commerce Clause nor Section 5 of the 14th Amendment provide a constitutional basis for the VAWA; the well-reasoned decision of the Fourth Circuit invalidating that statutory provision should therefore be affirmed.

ARGUMENT

I. IN ENACTING THE VAWA, CONGRESS HAS REJECTED THE PRINCIPLE OF ENUMERATED POWERS, A PRINCIPLE WHICH THE FOUNDERS BELIEVED TO BE ESSENTIAL TO LIBERTY.

When the framers of our Constitution met in Philadelphia in 1787, it was widely acknowledged that a stronger national government than existed under the Articles of Confederation was necessary if the new government of the United States was going to survive. The Continental Congress could not honor its commitments under the Treaty of Paris; it could not meet its financial obligations; it could not counteract the crippling trade barriers that were being enacted by the several states against each other; and it could not even insure that its citizens, especially those living on the western frontier, were secure in their lives and property. *See*, *e.g.*, Letter from Tench Coxe to the Virginia Commissioners at Annappolis (Sept. 13, 1786), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 473-74 (P. Kurland & R. Lerner eds., 1987) (noting that duties imposed by the states upon each other were "as great in many instances as those imposed on foreign Articles"); THE FEDERALIST NO. 22, at 144-45 (Alexander Hamilton) (C. Rossiter & C. Kesler eds., 1999) (referring to "[t]he interfering and unneighborly regulations in some States," which were "serious sources of animosity and discord" between the States); *New York*, 505 U.S. at 158 ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience") (quoting The Federalist No. 42, p. 267 (C. Rossiter ed. 1961)).

But the framers were equally cognizant of the fact that the deficiencies of the Articles of Confederation existed by design, due to a genuine and almost universal fear of a strong, centralized government. *See*, *e.g.*, *Bartkus* v. *People of State of Illinois*, 359 U.S. 121, 137 (1959) ("the men who

wrote the Constitution as well as the citizens of the member States of the Confederation were fearful of the power of centralized government and sought to limit its power"); *Garcia* v. *San Antonia Metropolitan Transportation Authority*, 469 U.S. 528, 568-69 (1985) (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor). Our forebears had not successfully prosecuted the war against the King's tyranny merely to erect in its place another form of tyranny.

The central problem faced by the convention delegates, therefore, was to create a government strong enough to meet the threats to the safety and happiness of the people, yet not so strong as to itself become a threat to the people's liberty. *See* THE FEDERALIST NO. 51, at 322 (Madison). The framers drew on the best political theorists of human history to craft a government that was most conducive to that end. The idea of separation of powers, for example, evident in the very structure of the Constitution, was drawn from Montesquieu, out of recognition that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (Madison).

But the framers added their own contribution to the science of politics, as well. In what can only be described as a radical break with past practice, the Founders rejected the idea that the government was sovereign and indivisible. Instead, the Founders contended that the people themselves were the ultimate sovereign, *see*, *e.g.*, James Wilson, Speech at the Pennsylvania Ratifying Convention (Nov. 26, 1787), *reprinted in* 2 James Wilson, The Works of James Wilson 770 (Robert Green McCloskey ed., 1967), and could delegate all or part of their sovereign powers, to a single government or to multiple governments, as, in their view, was "most likely to effect their Safety and Happiness," Declaration of Independence, ¶ 2. The importance of the division of

sovereign powers was highlighted by James Wilson in the Pennsylvania ratifying convention:

> I consider the people of the United States as forming one great community, and I consider the people of the different States as forming communities again on a lesser scale. From this great division of the people into distinct communities it will be found necessary that different proportions of legislative powers should be given to the governments, according to the nature, number and magnitude of their objects.
>
> Unless the people are considered in these two views, we shall never be able to understand the principle on which this system was constructed. I view the States as made *for* the people as well as *by* them, and not the people as made for the States. The people, therefore, have a right, whilst enjoying the undeniable powers of society, to form either a general government, or state governments, in what manner they please; or to accommodate them to one another, and by this means preserve them all. This, I say, is the inherent and unalienable right of the people.

James Wilson, Pennsylvania Ratifying Convention, (Dec. 4, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 62.

As a result, it became and remains one of the most fundamental tenets of our constitutional system of government that the sovereign people delegated to the national government only certain, enumerated powers, leaving the residuum of power to be exercised by the state governments or by the people themselves. *See*, *e.g.*, THE FEDERALIST NO. 39, at 256 (Madison) (noting that the jurisdiction of the federal government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers delegated by the proposed Constitution to the federal

government are few and defined. Those which are to remain in the State governments are numerous and indefinite"); *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Marshall, C.J.) ("We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended"); *Gregory*, 501 U.S. at 457 ("The Constitution created a Federal Government of limited powers").

This division of sovereign powers between the two great levels of government was not simply a constitutional add-on, by way of the Tenth Amendment. *See* U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). Rather, it is inherent in the doctrine of enumerated powers embodied in that text of the main body of the Constitution itself. *See* U.S. CONST. ART. I, Sec. 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States" (emphasis added)); Art. I, Sec. 8 (enumerating powers so granted); *see also M'Culloch*, 17 U.S. (4 Wheat.) at 405 ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted"); *United States* v. *Lopez*, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Govern-ment of enumerated powers").

The constitutionally-mandated division of the people's sovereign powers between federal and state governments was not designed to protect state governments as an end in itself, but rather "was adopted by the Framers to ensure protection of our fundamental liberties." *Lopez*, 514 U.S. at 552 (quoting *Gregory*, 501 U.S. at 458); *see also Gregory*, 501 U.S. at 458-59; *Atascadero State Hospital* v. *Scanlin*, 473 U.S. 234, 242 (1985) (quoting *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)); *Garcia*, 469 U.S. at 582 (O'Connor,

J., dissenting) ("This division of authority, according to Madison, would produce efficient government and protect the rights of the people") (citing THE FEDERALIST NO. 51, pp. 350-351 (Madison) (J. Cooke ed. 1961)). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 582 (quoting *Gregory*, 501 U.S. at 458); *Gregory*, 501 U.S. at 459 (quoting THE FEDERALIST NO. 28, pp. 180-81 (Hamilton) (J. Cooke ed. 1961)); *id.* (quoting THE FEDERALIST NO. 51, p. 323 (Madison) (J. Cooke ed. 1961)); *see also Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting) ("[The Framers] envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States" (citing *FERC* v. *Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting)); *id* at 571 (Powell, J., dissenting) ("The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government").

When Congress acts beyond the scope of its enumerated powers, therefore, it does more than simply intrude upon the sovereign powers of the states; it acts without constitutional authority, that is, tyrannically, and places our liberties at risk. *See, e.g.,* THE FEDERALIST NO. 33, at 204 (Hamilton) (noting that laws enacted by the Federal Government "which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies . . . will be merely acts of usurpation, and will deserve to be treated as such").

Foremost among the powers not delegated to the federal government was the power to regulate the health, safety, and

morals of the people—the so-called police power. *See, e.g.*, THE FEDERALIST NO. 45, at 292-93 (Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation"); *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 11 (1895) ("It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belong to the states, not surrendered by them to the general government"). The powers at issue in this case—to define and punish assaults and to provide civil remedies for intentional torts and rape—are within the core of the police powers reserved to the states.

Congress does retain some measure of discretion to choose the means necessary for giving effect to its enumerated powers, of course, *see infra*, at 15, but it cannot use its discretionary power over means in furtherance of ends not granted to it. As Chief Justice Marshall noted in *M'Culloch* v. *Maryland*: "[S]hould congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the [national] government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." 17 U.S. (4 Wheat.) at 423; *see also Carter* v. *Carter Coal Co.*, 298 U.S. 238, 317 (1936) (Hughes, C.J., separate opinion) ("Congress may not use this protective [commerce] authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly"). Because, as described below, Congress's attempts to link the vintage exercise of the state police powers at issue here to its power to regulate interstate

commerce is pretext of the highest order, Chief Justice Marshall's admonition is directly on point: It is the duty of this Court to say that the VAWA is not the law of the land.

II. THE VAWA IS NEITHER A REGULATION OF COMMERCE NOR A NECESSARY AND PROPER MEANS OF GIVING EFFECT TO A REGULATION OF COMMERCE.

A. As Originally Conceived, Congress's Power Under the Commerce Clause Was Limited To The Regulation of Interstate Trade.

Both Congress in enacting the VAWA, and the Executive branch in defending it before this Court, make a telling conflation of terms that demonstrates just how far removed from the Founders' conception of the Commerce power this statute really is. The VAWA is a permissible exercise of Congress's power to regulate commerce among the states, notes the 1993 Senate Report, because "[g]ender-based violence bars its most likely targets—women—from full [participation] in the national *economy*." S. Rep. No. 138, 103rd Cong., 1st Sess., at 54 (1993) (cited in Brief for the United States, at 6) (emphasis added). "Violent crime against women costs this country at least 3 billion . . . dollars a year," and a "significant portion of these costs [is] attributeed to the impact of gender-motivated violence on victims' participation and performance *in the workplace*. *Id.* at 33, 54 (cited in Brief for the United States, at 6-7) (emphasis added).

For the Founders, "commerce among the states" was not synonymous with "the economy" or with "the workplace." Far from it. "Commerce" was trade, not business generally. *See, e.g.*, *Corfield* v. *Coryell*, 6 F.Cas. 546, 550 (C.C.E.D.Pa. 1823) (Washington, J., on circuit) ("Commerce with foreign nations, and among the several states, can mean nothing more than intercourse with those nations, and among those states, for purposes of trade, be the object of the trade what it may"). Indeed, in the first major case arising under the clause to

reach this Court, it was contested whether the clause even extended so far as to include "navigation." Chief Justice Marshall, for the Court, held that it did, but even under his definition, "commerce" was limited to "intercourse between nations, and parts of nations, in all its branches." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); *see also Corfield*, 6 F.Cas. At 550 ("Commerce . . . among the several states . . . must include all the means by which it can be carried on, [including] . . . passage over land through the states, where such passage becomes necessary to the commercial intercourse between the states").

The *Gibbons* Court specifically rejected the notion "that [commerce among the states] comprehend[s] that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Gibbons*, 22 U.S. at 194. In other words, for Chief Justice Marshall and his colleagues, the commerce clause did not even extend to trade carried on between different parts of a state. The notion that the power to regulate commerce included the power to regulate other kinds of business or the economy generally, therefore, was completely foreign to them.

This understanding of the Commerce Clause continued for nearly a century and a half. Manufacturing was not included in the definition of commerce, held the Court in *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895), because "Commerce succeeds to manufacture, and is not a part of it." "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce . . . ." *Id.* at 13; *see also Kidd* v. *Pearson*, 128 U.S. 1, 20 (1888) (upholding a state ban on the manufacture of liquor, even though much of the liquor so banned was destined for interstate commerce). Neither were retail sales included in the definition of "commerce." *See The License Cases*, 46 U.S. (5 How.) 504 (1847) (upholding

state ban on retail sales of liquor, as not subject to Congress's power to regulate interstate commerce); *see also A.L.A. Schecter Poultry Corp.* v. *United States*, 295 U.S. 495, 542, 547 (1935) (invalidating federal law regulating in-state retail sales of poultry that originated out-of-state and fixing the hours and wages of the intrastate employees because the activity related only indirectly to commerce).

For the Founders and for the Courts which decided these cases, regulation of such activities as retail sales, manufacturing, and agriculture was part of the police powers reserved to the states, not part of the power over commerce delegated to Congress. *See, e.g., E.C. Knight*, 156 U.S. at 12 ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State") (citing *Gibbons*, 22 U.S. (9 Wheat.) at 210; *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 448 (1827); *The License Cases*, 46 U.S. (5 How.) at 599; *Mobile Co.* v. *Kimball*, 102 U.S. 691 (1880); *Bowman* v. *Railway Co.*, 125 U.S. 465 (1888); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *In re Rahrer*, 140 U.S. 545, 555 (1891)). And, as the Court noted in *E.C. Knight*, it was essential to the preservation of the states and therefore to liberty that the line between the two powers be retained:

> It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government. . . .

156 U.S. at 13; *see also Carter Coal*, 298 U.S. at 301 (quoting *E.C. Knight*); *Garcia*, 469 U.S. at 572 (Powell, J., dissenting, joined by Chief Justice Burger and Justices Rehnquist and O'Connor) ("federal overreaching under the

Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties").

While these decisions have since been criticized as unduly formalistic, the "formalism"—if it can be called that at all—is mandated by the text of the Constitution itself. *See, e.g., Lopez*, 514 U.S. at 553 ("limitations on the commerce power are inherent in the very language of the Commerce Clause") (citing *Gibbons*); *id* at 586 (Thomas, J., concurring) ("the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture"). And it is a formalism that was recognized by Chief Justice Marshall himself, even in the face of a police power regulation that had a "consideral influence" on commerce:

> The object of [state] inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation [reserved to the States]. . . . No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.

Gibbons, 22 U.S. at 203; *see also id.* at 194-95 ("Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State"). As this Court noted recently in *Lopez*, the "justification for this formal distinction was rooted in the fear that otherwise 'there would be virtually no limit to the federal power and for all practical

purposes we would have a completely centralized government." 514 U.S. at 555 (quoting *Schechter Poultry*, 295 U.S. at 548).

As should be obvious, the provision of VAWA at issue here is not a regulation of "commerce among the states," as that phrase was understood by those who framed and those who ratified the Constitution. Nor do the legislative findings about the impact of gender-motivated violance on the ecomony bring the VAWA under Congress's powers pursuant to the Necessary and Proper Clause. As has long been recognized, that clause gives Congress power over the means it will use to give effect to its enumerated powers; it does not serve as an end power unto itself. *See, e.g., Gibbons*, 22 U.S. (9 Wheat.) at 187 (describing the phrase "necessary and proper" as a "limitation on the means which may be used"); *M'Culloch*, 17 U.S. (4 Wheat.) at 324 (describing the Necessary and Proper Clause as merely a means clause). There has to be a regulation of commerce to which Congress hopes to give effect when it acts pursuant to the Necessary and Proper Clause, and there is no such regulation here. Congress simply cannot use such a pretextual reed to support its exercise of what is essentially a police power. *M'Culloch*, 17 U.S. (4 Wheat.) at 423. While it is undoubtedly true that, in today's world, the quantum of "commerce among the states" is much larger than in the founding era, the expansion in quantity does not give Congress a different qualitative power. Under the original view of the Commerce Clause, therefore, this is an extremely easy case.

B. Even Under The Expanded View of the Commerce Clause Taken In This Court's Modern-Era Precedents, The VAWA Exceeds The Outer Limits of the Power Afforded to Congress.

Even when the Court expanded the original understanding of the Commerce Clause in order to validate New Deal legislation enacted in the wake of the economic

emergency caused by the Great Depression, it was careful to retain certain limits lest the police power of the states be completely subsumed by Congress.

Thus, in *Jones & Laughlin Steel*, this Court stated that the power to regulate commerce among the states "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937) (cited in *Lopez*, 514 U.S. at 557). Similarly, Justice Cardozo noted in *Schechter Poultry* that "[t]here is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce." 294 U.S. 495, 554 (1935) (Cardozo, J., concurring) (quoted in *Lopez*, 514 U.S. at 567).

These reservations were key to this Court's decision in *Lopez*. As in *Lopez*, the statute at issue here does not regulate the channels or the instrumentalities of interstate commerce. And although the Government's use of the "substantial effects" test discussed in *Lopez* essentially converts the Necessary and Proper Clause from a means clause to an ends clause (and therefore renders it constitutionally suspect, *see Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring), the effects on interstate commerce articulated in the Congressional "findings" here are no different than the "cost of crimes" effect unsuccessfully relied upon by the Government in *Lopez*.

In short, even under the expanded view of the commerce clause that has been in place since the New Deal, this statute remains what it would have been for Chief Justice Marshall: A pretext for the exercise of police powers by Congress, powers that were and of right ought to be reserved to the states, or to the people. Given this Court's recent solicitude for the sovereignty of the States, *see, e.g.*, *Printz* v. *United States*, 521 U.S. 98 (1997); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996); *Alden* v. *Maine*, 119 S.Ct. 2240 (1999); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199 (1999), it would be odd indeed if Congress could intrude upon the powers reserved to the States, and hence on state sovereignty, in the much more substantial way presented by the VAWA.

III. THE VAWA CANNOT BE SUSTAINED AS AN EXERCISE OF CONGRESS'S POWER UNDER SECTION 5 OF THE 14th AMENDMENT.

In the VAWA, Congress has authorized a civil suit against private citizens, not against the state governments whose supposed denials of equal protection are the putative basis for the exercise of power here. But the 14th Amendment forbids the states from denying to any person the equal protection of the laws, not private persons. *See The Civil Rights Cases*, 109 U.S. 3 (1883). Even if such a private remedy might be permissible in some circumstances, it cannot be permissible where, as here, there is no underlying violation by the State. Christy Brzonkala was not denied the equal protection of the law; she did not even bother to avail herself of either the criminal law or tort law afforded to her by the Commonwealth of Virginia, and has never claimed that the State would not have enforced those laws on her behalf (much less that it would not have enforced those laws because of her gender).

Petitioners' contention is not that the State has discriminated against women in its laws against murder, or assault, or robbery, *see* Brief for the United States, at 42, but is rather that more needs to be done for victims of gender-motivated violence than is done for victims of ordinary, run-of-the-mill violence. In other words, petitioners all but concede that the states already provide equal protection; what

they seek here, and what VAWA provides them, is not a guarantee of equal protection but of special protection. This is necessary, apparently according to petitioners (and the so-called findings of Congress on which their argument is based), in order that conviction rates for rape (which disparately impacts women) can be made comparable to conviction rates for other crimes, such as murder or robbery. *See* S. Rep. No. 197, 102d Cong., 1st Sess., at 44 (1991) (describing the low conviction rate for rape) (quoted in Brief for the United States, at 9); *see also id.* at 43 (describing studies concuding "that crimes disproportionately affecting women are often treated less seriously than *comparable* crimes against men") (quoted in Brief for the United States, at 8) (emphass added).

Such a "comparable worth of crime" analysis finds no place in the jurisprudence of the 14th Amendment, and it should be rejected now. *See American Federation of State, County, and Mun. Employees, AFL-CIO* v. *State of Washington*, 770 F.2d 1401 (CA9 1985) (Kennedy, J.). The disparate impact theory upon which it is based suffers from the same infirmity. *See Washington* v. *Davis*, 426 U.S. 229 (1976). The 14th Amendment was designed to insure that individuals received equal protection from their state governments regardless of race, color, creed, or sex, not to give Congress a pretext for appropriating to itself a general police power or for providing additional remedies (such as the attorneys fees at issue here, which is what this case appears really to be about) to a particular class of citizens that the States have not provided to anyone.

There is no constitutional violation by the states here; hence, there can be no remedy under the 14th Amendment. *City of Boerne* v. *Flores*, 521 U.S. 507, 531-32 (1997). The VAWA simply cannot be sustained as an exercise of Congress's powers under Section 5 of the 14th Amendment.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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